BERNARD CHAI

v.

KLANG PORT AUTHORITY

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: S5-22-347-1987]
29 JANUARY 1999

CIVIL PROCEDURE: *Want of prosecution - Dismissal of action for want of prosecution - Default to comply with order - Whether intentional and contumelious - Whether default was disobedience to a peremptory order - Whether amounted to an abuse of the process of the court - Birkett v. James*

CIVIL PROCEDURE: *Want of prosecution - Dismissal of action for want of prosecution - Delay - Whether inordinate and inexcusable delay - Whether delay on part of solicitors rendered excusable - Whether a fair trial possible*

CIVIL PROCEDURE: *Want of prosecution - Dismissal of action for want of prosecution - Delay - Prejudice to peace of mind - Damocletian prejudice - Whether entitled defendant to relief*

CIVIL PROCEDURE: *Action - Dismissal of action - Failure to comply with order pertaining to documents - Rules of the High Court 1980, O. 24 r. 16(1) - Whether court could dismiss action*

This was an appeal by the plaintiff against the dismissal of his action by the Deputy Registrar for want of prosecution. The plaintiff had earlier filed an action against the defendant for unlawful dismissal from the defendant's employment.

The defendant submitted that the plaintiff's failure to comply with an order concerning documents by the Senior Assistant Registrar on 25 February 1988 was intentional and contumelious. Also that O. 24 r. 16(1) of the Rules of the High Court 1980 empowered the court to dismiss the action if the plaintiff failed to make discovery of documents or to produce documents for inspection. Further, that a fair trial would not be possible due to the inordinate and inexcusable delay on the part of the plaintiff to prosecute the action, and that the delay would bring serious prejudice to the defendant's case. Apart from this, it was submitted that the prejudice to the defendant was in having the action hanging over its head. The plaintiff, on the other hand, admitted undue delay on his part but blamed his former solicitor for the inactivity.

Held:

[1] The power to dismiss actions for want of prosecution should be exercised only where the court is satisfied that the default has been intentional and contumelious, or that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause serious prejudice to the defendant (*Birkett v. James*).

[2] The power of dismissal under O. 24 r. 16(1) is exercisable where the obligation of the plaintiff to make discovery of documents or to produce documents is imposed by a rule under O. 24 or by any other order made under O. 24. However, the order made on 25 February 1988 was an order made under O. 25 on a summons for directions. Furthermore, the application for dismissal for want of prosecution was not one made under O. 24 r. 16(1).

[3] Mere default is not sufficient. The default must not only be intentional but also contumelious. The example of such a default is one of disobedience to a peremptory order or of conduct amounting to an abuse of the process of the court. The order made on 25 February 1988 was not a peremptory order. The default to comply with the order could not be said to be conduct amounting to an abuse of the process of the court. Also, the default could not be said to be intentional and contumelious.

[4] There was inordinate delay on the part of the plaintiff or his lawyers to prosecute the action since the order of 25 February 1988. When the defendant filed its dismissal application, six years had gone by. In that time, the plaintiff had only filed a notice of intention to proceed and a bundle of documents and had not complied with the order of 25 February 1988. Even if want of prosecution is the default of the solicitors, the delay is not rendered excusable.

[5] The defendant did not attempt to elaborate or explain its assertion that a fair trial would not be possible and that the delay would bring serious prejudice to the defendant's case. As such, this assertion was rejected.

[6] The notion of Damocletian prejudice, ie, prejudice to peace of mind, was meant to bring relief from the effect of *Birkett v. James* to a defendant who had already been greatly prejudiced in the conventional sense by the plaintiff's delay in issuing his writ and cannot possibly be further prejudiced in the same sense by any delay after the issue of the writ. A defendant is not entitled to rely for relief on Damocletian prejudice if he

does not show that he had been greatly prejudiced in the conventional sense by delay in the issuance of the writ. In this instance, the defendant had not shown such prejudice.

[Appeal allowed.]

Cases referred to:
Birkett v. James [1977] 2 All ER 801 ***(foll)***
Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 24, O. 24 r. 16(1), O. 25

For the plaintiff - Ranjini Tharumaratnam; M/s Aris Rizal Christopher Fernando & Co
For the defendant - Jyotsana Doshi; M/s Abdullah & Zainuddin

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

This is an appeal by the plaintiff from the dismissal by the learned Deputy Registrar of this action of his for want of prosecution.

The cause of action is one of unlawful dismissal and arose on 30 November 1981 when the plaintiff was dismissed, unlawfully he claims, from the defendants' employment.

The plaintiff filed this action on 6 October 1987, within the limitation period but almost at the end of it. He filed an amended writ and statement of claim on 17 November 1987.

The particulars of illegality in the dismissal are given in para. 8 of the amended statement of claim. Essentially the plaintiff alleges that the allegations in the show-cause letter were vague, general and did not contain such particulars as would reasonably be sufficient to give him notice of the matters with which he was charged, and that he was actually dismissed on other charges that were not included in the show-cause letter. The trial of the action, were it to proceed, will therefore be confined to an examination of procedural matters and of the related law and will not involve an enquiry into factual matters as to whether the plaintiff did or did not commit the acts of misconduct alleged against him. Compliance with disciplinary procedure will be a matter of record and if any witness is required to give evidence by the defendants it will be evidence by reference to official records.

On 25 February 1988, on a summons for directions filed by the plaintiff after due filing of the statement of defence, the Senior Assistant Registrar ordered the parties to serve on one another lists of documents within 30 days and to carry out inspection of original documents within 30 days of service of the lists.

The plaintiff failed to comply with the order concerning documents. He took no step in prosecuting the action until three years later, when, on 26 February 1991, he filed a notice of intention to proceed with the action. On 19 April 1991 he filed his bundle of documents.

No steps were taken to set the action down for trial. Three years later, on 1 March 1994, a notice of change of solicitors for the plaintiff was filed to the effect that the plaintiff's present solicitors had been appointed to act for him in place of the solicitors who had been acting for him from the beginning, Karam Singh Veriah & Co.

On 12 April 1994, not long after their appointment, the plaintiff's present solicitors wrote to the court requesting for trial dates. Obviously they were not aware that the action had not been set down for trial. So no trial date could be given.

On 21 June 1994 the defendants filed their application for dismissal for want of prosecution. It was only after that, on 26 July 1994, that the plaintiff, through their present solicitors, filed papers for setting the action down for trial.

On the defendants' dismissal application, this action was dismissed on 1 August 1994.

The principles on which the jurisdiction to dismiss actions for want of prosecution is to be exercised are as reiterated by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801 at p. 805 a-c:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

Learned counsel for the defendants said in submission that the defendants relied on both grounds (1) and (2) in that passage in seeking to dismiss the plaintiff's action.

Learned counsel related ground (1) to the plaintiff's failure to comply with the order made on 25 February 1988 concerning documents. She submitted that the failure was intentional and contumelious. She also cited O. 24 r. 16(1) of the Rules of the High Court 1980 which empowers the court to dismiss the action if the plaintiff fails to make discovery of documents or to produce documents for inspection. But the power of dismissal under O. 24 r. 16(1) is exercisable where the obligation of the plaintiff to make discovery of documents or to produce documents is imposed by a rule under O. 24 or by any order made under O. 24, whereas the orders made on 25 February 1988 were orders made under O. 25 on a summons for directions. Furthermore, the application for dismissal for want of prosecution in this case was not one made under O. 24 r. 16(1).

For ground (1), mere default is not sufficient. The default must be not only intentional but also contumelious. The example given in the passage cited of such a default is one of disobedience to a peremptory order or of conduct amounting to an abuse of the process of the court. The orders made on 25 February 1988 were not peremptory orders. I do not see that the default to comply with the order was conduct amounting to an abuse of the process of the court. I do not think that in any other sense the default to comply with the orders can be said to be intentional and contumelious.

As for ground (2), there was inordinate delay on the part of the plaintiff or his lawyers to prosecute the action since the orders of 25 February 1988. When the defendants filed their dismissal application, six years had gone by. In that time the plaintiff had only filed a notice of intention to proceed and a bundle of documents and had not complied with the orders of 25 February 1988. The plaintiff admits undue delay in para. 6 of his affidavit dated 27 July 1994. The plaintiff, however, blames his former solicitor, Encik Karam Singh, for the inactivity. Encik Karam Singh has passed away, and from para. 10 of the plaintiff's said affidavit I get the impression that Encik Karam Singh's demise was after the plaintiff had engaged his present solicitors, which he did, according to him in para. 8, after being "utterly disgusted" with his former solicitor. I do not have to dwell on what efforts the plaintiff says he made to get the action going because, even if want of prosecution is the default of solicitors, the delay is not rendered excusable.

As to the effect of the inordinate and inexcusable delay on the part of the plaintiff that the defendants allege in para. 9 of their affidavit dated 16 May 1994. The effect that they allege is on the case. They simply say that a fair trial would not be possible and that the delay would bring serious prejudice to the defendants' case. They do not attempt to elaborate or explain their assertion. For that reason, and in view of what I have stated earlier about what the trial of the action would involve, I reject the defendants' assertion that a fair trial would not be possible or that the defendants' case has suffered or would suffer serious prejudice.

In submission, however, learned counsel for the defendants said that the prejudice to the defendants was in having the action hanging over their heads. It was the "prejudice to Damocles", the idea of which was introduced by Lord Denning MR, sitting in the Court of Appeal in *Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125. Before that case, the idea of prejudice had been confined to the kinds of prejudice mentioned in the passage quoted earlier from the speech of Lord Diplock, namely, prejudice in the realm of evidence, that is to say, in the matter of witnesses and documents, and prejudice as between parties. Let me try and state very briefly why, as I understand *Biss*, the idea of Damocletian prejudice was introduced.

Mrs Biss was possessed by the idea that the nurses who had attended to her in 1965 at Lewisham Hospital had been negligent and set about to sue the hospital. By 1967 the hospital – I need not say why – understandably thought that the threat of a suit had ended. But in 1975, ten years after the alleged negligence, Mrs Biss issued a writ after obtaining leave under the Limitation Act 1963. After pleadings closed, she was admittedly guilty of inordinate and inexcusable delay in proceeding with her action. She did not comply with a request for further and better particulars. She failed to go and see a doctor for a further medical opinion. By the time she issued her writ, as Lord Denning found, great prejudice to the hospital had taken place in the realm of evidence. The delay on Mrs Biss's part after the issue of the writ could not have caused any additional prejudice to the hospital in that realm. It was argued, when the hospital sought to have Mrs Biss's action dismissed for want of prosecution, that the action could not be dismissed because the delay since the writ had not caused any prejudice in the realm of evidence. That argument was based on the House of Lord's decision in *Birkett v. James* [1977] 2 All ER 801 that post-writ delay, to constitute grounds warranting dismissal, must have increased the prejudice already caused by the pre-writ delay.

Lord Denning was concerned that "If the approach established in *Birkett v. James* is carried to its logical conclusion, it would mean that in the many cases where the plaintiff takes advantage of the full period of limitation, so

that the defendant is hopelessly prejudiced before the writ is issued, then the plaintiff can delay afterwards to an inordinate and inexcusable extent, with impunity". See p. 131 b. It was to avoid such an undesirable consequence that Lord Denning lighted upon the idea of Damocletian prejudice. I quote the entire passage from his judgment at p. 131 d-g:

> Seeing that the House of Lords cannot have envisaged such cases as these, I feel we must seek for some solution ourselves, so far as we can do so, consistently with what the House of Lords have said. The one solution that I see is that the prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial; like the prejudice to Damocles when the sword was suspended over his head at the banquet. It was suspended by a single hair and the banquet was a tantalising torment to him. So in the *President of India* case, which we heard the other day. The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it. Likewise the hospital here. There comes a time when it is entitled to have some peace of mind and to regard the incident as closed. It should not have to keep in touch with the nurses saying: 'We may need you to give evidence'; or to say to the finance department: 'We ought to keep some funds in reserve in case this claim is persisted in'; or to say to the keepers of records: 'Keep these files in a safe place and don't destroy them as we may need them.' It seems to me that in these cases this kind of prejudice is a very real prejudice to a defendant when the plaintiff is guilty of inordinate and inexcusable delay since the issue of the writ, and that it can properly be regarded as more than minimal. And when this prejudice is added to the great and prejudicial delay before writ (as the House of Lords says it may be: see *Birkett v. James*) then there is sufficient ground on which to dismiss the action for want of prosecution.

It seems to me that the notion of Damocletian prejudice, that is prejudice to peace of mind, was meant to bring relief from the effect of *Birkett v. James* to a defendant who had already been greatly prejudiced in the conventional sense by the plaintiff's delay in issuing his writ and cannot possibly be further prejudiced in the same sense by any delay after the issue of the writ. With *Birkett v. James*, he cannot effectively complain about any inordinate delay after the issue of the writ. With the new idea, however, he can complain that not only had he suffered great prejudice in the conventional sense as a result of the plaintiff's delay in issuing the writ, but he has also been bearing the burden of an unquiet mind by the plaintiff's inordinate and inexcusable delay after the issue of the writ. It follows, I think, that a defendant is not entitled

to rely for relief on Damocletian prejudice if he does not show that he had been prejudiced in the conventional sense by delay in the issuance of the writ. He cannot succeed in having the action dismissed for want of prosecution on a complaint of Damocletian prejudice alone. Lord Denning's solution was not intended to be applied as an alternative or substitute for the conventional approach. If it was, I fear that it would become quite easy to dismiss an action for want of prosecution. It was intended to be applied complementarily to the conventional approach. Lord Denning was careful to say that it was a solution that the Court of Appeal had to seek for "consistently with what the House of Lords have said". In this respect I think there is significance in the last sentence of the passage from *Biss* cited earlier, where mention is made of the Damocletian prejudice being added to conventional pre-writ prejudice. The defendants in this case, as I said earlier, have not demonstrated in what manner they had been prejudiced in the conventional sense by the plaintiff's delay in commencing this action.

The defendants have, therefore, failed to satisfy all the requirements for a dismissal for want of prosecution under ground (2). I allow the appeal and set aside the orders given by the Deputy Registrar on 1 August 1994.